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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

ERLINDA A. ANIEL,

Plaintiff and Appellant,

v.

EMC MORTGAGE CORPORATION et
al.,

Defendants and Respondents.

A136399

(San Mateo County

Super. Ct. No. CIV499323)

Erlinda Aniel appeals from a judgment entered after the court sustained demurrers to her complaint challenging a nonjudicial foreclosure sale of a house she formerly owned with her husband, Fermin Aniel.¹ We conclude Aniel's second amended complaint failed to allege a viable cause of action, and that the court was within its discretion when it sustained the demurrers without leave to amend. Accordingly, we affirm.

BACKGROUND

Because this appeal challenges a trial court order sustaining a demurrer, we draw the relevant facts from the complaint and documents subject to judicial notice. (*Adams v. Paul* (1995) 11 Cal.4th 583, 586; *Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1608–1609 (*Hamilton*).)

¹Fermin Aniel is not a party to this appeal.

In May 2005, Aniel purchased the house and refinanced it the following year with a \$1 million loan from Bear Stearns Residential Mortgage Corporation (Bear Stearns). The loan was secured by a deed of trust against the property. The deed of trust named Mortgage Electronic Registration Systems, Inc. (MERS) as the lender's nominee to act as beneficiary,² Fidelity National Title (Fidelity) as trustee, and the Aniels as borrower. In 2009, MERS assigned its beneficial interest in the deed of trust to a securitized trust, "Wells Fargo Bank, National Association as Trustee for the Certificateholders of Structured Asset Mortgage Investments II Inc., Bear Stearns Mortgage Funding Trust 2006-AR5, Mortgage Pass-Through Certificates, Series 2006-AR5" (Wells Fargo).

On July 1, 2008, the Aniels stopped making loan payments. In May 2010, NDEx West, LLC (NDEx), as agent for the beneficiary, recorded a Notice of Default and Election to Sell Under Deed of Trust. The default notice said the loan was \$121,195.06 in arrears as of May 24, 2010. NDEx was subsequently designated successor trustee, and noticed a trustee's sale scheduled for September 2010. Wells Fargo purchased the property at the trustee's sale for \$1,195,936.23, the amount of the unpaid debt plus costs.

The Complaint

The operative pleading is Aniel's second amended complaint, filed in December 2011 against EMC Mortgage Corporation (EMC), MERS, NDEx, and Wells Fargo.

²MERS is used by the mortgage banking industry to facilitate the securitization of real property debt instruments. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 267 (*Fontenot*).) As *Fontenot* explains, MERS "is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred among members without requiring recordation in the public records." (*Id.* at pp. 466–467.) Although the owner of a promissory note secured by a deed of trust is ordinarily designated as the beneficiary of the trust deed, under the MERS System, "MERS is designated as the beneficiary in deeds of trust, acting as 'nominee' for the lender, and granted the authority to exercise legal rights of the lender." (*Id.* at p. 477.)

Aniel alleged that she contacted EMC in May 2008 to request a loan modification. According to the complaint, an EMC customer service representative told Aniel that “Plaintiff ‘must default on their mortgage loan in order to get and be approved for a loan modification’ ” and “also told Plaintiff ‘not to pay their mortgage loan within 90 days.’ Because of Plaintiff’s reliance [on] EMC’s representation, she stopped making minimum monthly payments on her mortgage.” Aniel renewed her request for a loan modification in September 2008, but was turned down. Instead, the complaint alleges, “EMC initiated the scheme to foreclose the property and gain profits by adding and inflating the fees on which EMC could raise the debt,” and demanded that Aniel cure her debt before it would approve a modification.

The complaint alleged that defendants had no interest in the loan or standing to foreclose, but “aggressively sought to foreclose the property” and “made it impossible for Plaintiff to reorganize her debt on the property in good faith.” It also alleged that Bear Stearns could not validly assign its interest in the trust deed to Wells Fargo because Bear Stearns was no longer doing business when the assignment was executed, that MERS had no authority to assign its beneficial interest in the deed to Wells Fargo without authorization from Bear Stearns, that the assignment to Wells Fargo was “a product of robo-signing,” and that the substitution of trustee by which NDEx replaced Fidelity was invalid for various reasons including that it was executed by a “robo-signer,” Wells Fargo had no authority to substitute the Trustee, and the documentation was improperly notarized. The complaint included causes of action for fraud, wrongful foreclosure, unfair competition, promissory estoppel, and to set aside the foreclosure sale, cancel the trustee’s deed, and quiet title.

NDEx demurred, as, jointly, did EMC, MERS, and Wells Fargo. The trial court sustained both demurrers without leave to amend. As relevant here, the court concluded that Aniel’s cause of action for fraud failed because it was based on statutorily privileged notices and communications in relation to the nonjudicial foreclosure and there were no

allegations of malice. It rejected her causes of action for wrongful foreclosure and to set aside the sale and cancel the trustee's deed because Aniel failed to allege she had tendered the debt. "The Complaint alleges no facts that place Plaintiff into the exceptions to the tender rule, such as the *Onofrio* (challenging validity of debt) and *Dimock* (foreclosure by wrong trustee) cases. Further, the allegations concerning the timing of recording the Substitution of Trustee and Assignment of Deed of Trust . . . do not support a claim to set aside the sale." (*Fontenot, supra*, 198 Cal.App.4th at p. 272.)

Aniel timely appealed from the judgments entered on the demurrers.

DISCUSSION

I. Standards of Review

We review an order sustaining a demurrer de novo to determine whether the complaint states facts sufficient to constitute a cause of action. (*Bower v. AT&T Mobility, LLC* (2011) 196 Cal.App.4th 1545, 1552; *Stanton Road Associates v. Pacific Employers Ins. Co.* (1995) 36 Cal.App.4th 333, 340 (*Stanton Road*).) We construe the complaint liberally, treating it " "as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. . . ." " (*Stanton Road, supra*, 36 Cal.App. 4th at pp. 340–341; *Jager v. County of Alameda* (1992) 8 Cal.App. 4th 294, 296–297.) When a demurrer is sustained without leave to amend, "we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." [Citations.]" (*Stanton Road, supra*, at p. 341.)

II. Analysis

Aniel's arguments are based on two general theories. First, she asserts EMC tricked her into defaulting on the loan by falsely promising to modify the loan if, and only if, she defaulted. Second, she contends, in essence, that the recorded documents misrepresented the respective interests of Wells Fargo, EMC and NDEx in the property, so they had no legal right to foreclose. Neither theory has merit.

A. Fraud as to EMC

"The essential allegations of a cause of action for deceit are representation, falsity, knowledge of falsity, intent to deceive, and reliance and resulting damage (causation). [Citation.] '[F]raud must be pled specifically; general and conclusory allegations do not suffice.' [Citation.] The particularity requirement 'necessitates pleading *facts* which 'show how, when, where, to whom, and by what means the representations were tendered.' " [Citation.] A plaintiff's burden in asserting a fraud claim against a corporate employer is even greater. In such a case, the plaintiff must 'allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written.' " (*Hamilton, supra*, 195 Cal.App.4th at p. 1614; *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.) "We enforce the specificity requirement in consideration of its two purposes. The first purpose is to give notice to the defendant with sufficiently definite charges that the defendant can meet them. [Citation.] The second is to permit a court to weed out meritless fraud claims on the basis of the pleadings; thus, 'the pleading should be sufficient " 'to enable the court to determine whether, on the facts pleaded, there is any foundation, prima facie at least, for the charge of fraud.' " " " (*West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 793.)

Hamilton, supra, 194 Cal.App.4th is illustrative. The plaintiffs there alleged that their mortgage lender instructed them to postpone making mortgage payments on a forbearance plan until they received further instructions, while actually intending to

defraud them of their property. (*Hamilton, supra*, at p. 1615.) Those allegations were insufficient to state a claim for fraud. “Plaintiffs do not allege that Greenwich Investors actually told them not to make any payments while ‘await[ing] notification’; they do not say who at Greenwich Investors made any statements to them; they allege no facts showing defendants’ ‘real intention’ was to defraud them; and they do not say they could or would have made payments if only Greenwich Investors had not told them not to do so. In short, plaintiffs’ allegations entirely fail to specify who said what to whom and how any such statements caused them harm.” (*Ibid.*)

Here, the complaint alleged that an EMC customer representative told Aniel she had to default on the mortgage to be approved for a loan modification and “ ‘not to pay their mortgage loan within 90 days.’ ” According to the complaint, Aniel stopped making loan payments in reliance on that statement. She again requested a modification in September, but EMC refused to modify the loan “as promised.” “Instead, EMC initiated the scheme to foreclose the property and gain profits by adding and inflating the fees on which EMC could raise the debt. EMC’s promise to modify the loan once the Plaintiff fell behind in payments was heavily relied by the Plaintiff’s decision not to continue making mortgage payments. Rather than modifying the loan as they promised, EMC demanded that Plaintiff cure her debt before any modification would be approved.”

These allegations are insufficient to state a fraud cause of action. As in *Hamilton*, the complaint fails to identify the EMC representative who allegedly told Aniel to stop making payments. To be sure, we do not require such specificity in pleading if the identity of the employee who made the alleged statement is uniquely within the corporate defendant’s knowledge. (See *Committee on Children’s Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 214.) That is not the situation here, so it was incumbent on Aniel to identify the person who allegedly made the misrepresentation. But even if Aniel can do so, her complaint does not sufficiently allege fraud. As in *Hamilton, supra*, 194 Cal.App.4th, Aniel failed to allege any facts supporting her allegation that EMC

“initiated the scheme to foreclose the property and gain profits . . .” or that she could or would have made loan payments but for the alleged misrepresentation. “[F]raud must be pled specifically; general and conclusory allegations do not suffice.” (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) Nor does the complaint allege that Aniel acted in reasonable reliance on EMC’s alleged promise—a particularly problematic omission given that Aniel alleged she was told to stop paying the mortgage for 90 days in May 2008, but apparently never resumed making payments after EMC rejected her modification request in September 2008. A notice of default was not issued until May 2010, 20 months later. How was it reasonable for Aniel to continue withholding payments for another 20 months after EMC told her it would not modify her mortgage? The complaint does not say. Aniel vaguely alludes to EMC “inflating . . . fees” and that “[t]he amount due in the default was too high for the Plaintiff to recover,” but leaves entirely unclear when or why that became the case. Vague and conclusory allegations are insufficient when fraud is alleged, so the trial court properly sustained the demurrer as to fraud based on the alleged promise to modify the loan.

B. Wrongful Foreclosure and Fraud as to NDEx, MERS and Wells Fargo

Aniel’s remaining claims of fraud and wrongful foreclosure are premised on her theory that Wells Fargo, EMC and NDEx misrepresented their interests in the loan and that, due to irregularities in the documentation, they in fact had no legal or equitable right to foreclose. Specifically, as we understand her complaint, Aniel alleges that MERS’s assignment of the deed of trust to Wells Fargo was invalid because it was made after Bear Stearns ceased doing business and after a cut-off date for placing instruments in the Wells Fargo securitized trust. The complaint also alleges various irregularities in the documents assigning the deed to Wells Fargo and appointing NDEx as successor trustee, primarily because they were “robo-signed,” as, allegedly, were the notice of default and declaration of compliance prepared by NDEx.

The trial court ruled that these allegations, too, failed to state a cause of action. We agree. To the extent Aniel’s fraud claims are based on her allegations that the assignments, foreclosure notices and other loan documentation “purport ownership in the loan that likely never occurred,” they are subject to the qualified privilege of Civil Code section 47, subdivision (c) and, therefore, are actionable only upon a showing of malice. (Civ. Code, § 2924, subd.(d);³ *Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 335–341 (*Kachlon*).) The “privileges apply to all torts except malicious prosecution.” (*Id.* at p. 336.) But, as the trial court observed, the complaint does not allege malice. “For this purpose, malice is defined as actual malice, meaning ‘that the publication was motivated by hatred or ill will towards the plaintiff *or* by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff’s rights.’ ” (*Id.* at p. 336.) Aniel argues the court “should have inferred malice” from her allegations that EMC promised to modify her loan and that “[k]nowing that they did not possess a legal, equitable, or enforceable right to enforce the terms of the Note and Deed, Respondents produced documents recorded in the County of San Mateo that purport ownership in the loan that likely never occurred.” We disagree. These conclusory allegations fail to demonstrate the “ ‘wanton and reckless disregard of the consequences and of the rights and of the feelings of others’ ” (*Kachlon, supra*, 168 Cal.App.4th at p. 554) required to defeat the qualified privilege.

Aniel’s allegations of irregularities in the foreclosure documentation also fail for another reason. Aniel alleges no plausible claim that she was prejudiced by any of the

³Civil Code section 2924, subdivision (d) provides that “All of the following shall constitute privileged communications pursuant to Section 47: [¶] (1) The mailing, publication, and delivery of notices as required by this section. [¶] (2) Performance of the procedures set forth in this article. [¶] (3) Performance of the functions and procedures set forth in this article if those functions and procedures are necessary to carry out the duties described in Sections 729.040, 729.050, and 729.080 of the Code of Civil Procedure.”

alleged defects. “[A] plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff’s interests. . . . ‘A nonjudicial foreclosure sale is presumed to have been conducted regularly and fairly; one attacking the sale must overcome this common law presumption “by pleading and proving an improper procedure *and the resulting prejudice.*” ’ ” (*Fontenot, supra*, 198 Cal.App.4th at p. 272.)

Fontenot is on point. There, rejecting similar challenges to a foreclosure that followed the assignment of a deed of trust from MERS to a successor beneficiary, the court noted that “[p]rejudice is not presumed from ‘mere irregularities’ in the process. [Citation.] Even if MERS lacked authority to transfer the note, it is difficult to conceive how plaintiff was prejudiced by MERS’s purported assignment, and there is no allegation to this effect. Because a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor. As to plaintiff, an assignment merely substituted one creditor for another, without changing her obligations under the note. Plaintiff effectively concedes she was in default, and she does not allege that the transfer . . . interfered in any manner with her payment of the note [citation], nor that the original lender would have refrained from foreclosure under the circumstances presented. If MERS indeed lacked authority to make the assignment, the true victim was not plaintiff but the original lender, which would have suffered the unauthorized loss of a . . . promissory note.” (*Fontenot, supra*, 198 Cal.App.4th at p. 272; *Debrunner v. Deutsche Bank Nat. Trust Co.* (2012) 204 Cal.App.4th 433, 443–444.) So, too, here.

The court also correctly ruled that Aniel’s causes of action for wrongful foreclosure and to set aside the foreclosure sale failed because she neither alleged tender of the debt nor facts that would invoke an exception to the tender requirement. “A valid and viable tender of payment of the indebtedness owing is essential to an action to cancel a voidable sale under a deed of trust.” (*Karlsen v. American Sav. & Loan Assn.* (1971) 15 Cal.App.3d 112, 117.) “This rule is premised upon the equitable maxim that a court

of equity will not order that a useless act be performed. ‘Equity will not interpose its remedial power in the accomplishment of what seemingly would be nothing but an idly and expensively futile act, nor will it purposely speculate in a field where there has been no proof as to what beneficial purpose may be subserved through its intervention.’ ” (*Arnolds Management Corp. v. Eischen* (1984) 158 Cal.App.3d 575, 578–579.)

Aniel implicitly concedes she cannot allege tender, but argues that no tender is required because her allegations challenge the validity of the debt. (See *Onofrio v. Rice* (1997) 55 Cal.App.4th 413, 424 [if the action attacks the validity of the underlying debt, tender is not required since it would constitute an affirmation of the debt]; *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112–113.) Not so. The complaint alleged that irregularities in the assignment of the deed of trust and substitution of trustee invalidated the foreclosure sale, but there is no allegation that the underlying debt was itself invalid. Aniel also argues that tender may be excused where it would be inequitable to require it, but she identifies no factual allegations that suggest this is such a case. Her allegations of defects in the assignment of the trust deed and substitution of trustee do not support such a claim, because she has not identified any resulting prejudice.

Aniel’s causes of action for unfair business practices, to quiet title, and for declaratory relief are entirely derivative of her fraud and wrongful foreclosure causes of action, so the trial court properly sustained the demurrers as to those claims as well. She has also failed to demonstrate the trial court abused its discretion when it denied her leave to amend. “ ‘A general demurrer may be sustained without leave to amend where it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a cause of action.’ ” (*Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, 823.) It is Aniel’s burden to show what facts he or she could plead to cure the defects in the complaint. (*Total Call Internat., Inc. v. Peerless Ins. Co.* (2010) 181 Cal.App.4th 161, 166.) “ ‘To meet this burden, a plaintiff must submit a proposed amended complaint or, on appeal, enumerate the facts and demonstrate how those facts

establish a cause of action.’ ” (*Ibid.*) Aniel did neither. She did not filed a proposed amended complaint in the trial court. On appeal she claims that she can amend her complaint to identify the EMC employee she alleges told her to stop making mortgage payments, but, as we have explained, the omission of that information was not the only fatal defect in her fraud cause of action. She also asserts she can amend to “make it clear she is disputing the validity of the debt” and “clearly allege malice,” but she has not shown what facts she could plead to do so. The court properly denied leave to amend.

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P.J.

Jenkins, J.